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Case No.: 2:12-cr-00237-APG-CWH

**ORDER DENYING DEFENDANT
GAYTAN'S MOTION IN LIMINE TO
PRECLUDE IN-COURT
IDENTIFICATION BY WITNESSES
WHO WERE NOT PREVIOUSLY
SHOWN A PHOTO ARRAY OR WHO
FAILED TO IDENTIFY GAYTAN IN
A PHOTO ARRAY [Dkt. # 138]**

Defendant.

On May 27th, 2012, seven days after the robbery at issue in this case, the police prepared a photo lineup containing the photos of defendants Julian Gaytan and David Duran. Two witnesses, Jesus Medina and Misael Garcia, identified Gaytan in the photo line-up. A third witness, Doris Martinez (“D.M.”), did not identify Gaytan in the photo lineup. Another witness, Yuriana Ramirez (“Y.R.”), identified another person in the lineup. Gaytan now seeks to preclude in-court identifications by witnesses who were not previously shown a photo array or who failed to identify Gaytan in a photo array (specifically, Y.R. and D.M.).

1 Witnesses to a crime may testify as to their identification of one or more defendants as a
2 participant in the crime. 18 U.S.C. § 3502. Non-expert opinions are admissible if rationally
3 based on the perception of the witness and helpful to a clear understanding of testimony or the
4 determination of a fact in issue. Fed.R.Evid. 701. Under Rule 701, lay witness identifications are
5 admissible if they are “based upon personal observation and recollection of concrete facts.”
6 *United States v. Beck*, 418 F.3d 1008, 1015 (9th Cir. 2005) (quoting *United States v. Allen*, 787
7 F.2d 933, 935 (4th Cir. 1986)).

8 The Supreme Court has set out five factors to consider in determining whether an
9 identification is reliable: (1) the opportunity of the witness to view the criminal at the time of the
10 crime; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of
11 the criminal; (4) the level of certainty demonstrated by the witness at the confrontation; and (5)
12 the length of time between the crime and the confrontation. *Neil v. Biggers*, 409 U.S. 188, 199-
13 200 (1972). The length of a witness’s prior exposure to the defendant goes only to the weight of
14 the testimony and does not affect admissibility. *Beck*, 418 F.3d at 1015.

15 “[I]n-court identification procedures [are improper if they] are so “unnecessarily
16 suggestive and conducive to irreparable misidentification’ as to amount to a denial of due
17 process of law.”” *U.S. v. Williams*, 436 F.2d 1166, 1168–69 (9th Cir. 1970) (quoting *Stovall v.*
18 *Denno*, 388 U.S. 293, 302 (1967)). The key question is whether the circumstances surrounding
19 the identification present a substantial likelihood of irreparable misidentification. *Manson v.*
20 *Brathwaite*, 432 U.S. 98, 116 (1977). “Short of that point, such evidence is for the jury to
21 weigh.” *Id.* The identifying witness must testify based on her independent recollection of the
22 incident that is wholly untainted by police misconduct or other contamination. *See U.S. v.*
23 *Lumitap*, 111 F.3d 81, 84 (9th Cir. 1997); *U.S. v. Domina*, 784 F.2d 1361, 1368 (9th Cir. 1986).

1 The court must consider whether the only evidence against the defendant is the in-court
2 identification and, if so, the identification procedure should be as lacking in suggestiveness as is
3 possible. *Domina*, 784 F.2d at 1369. *Cf.*, *Lumitap*, 111 F.3d at 84–85 (allowing in-court
4 identification even though it was the only evidence against defendant).

5 In the present case, the in-court identification of Gaytan is not the only evidence to be
6 offered against him. His wallet was found at the scene. The Government will attempt to
7 introduce text messages he allegedly sent and received. Evidence may be presented showing that
8 his cell phone was in Las Vegas on the day of the crime. Gaytan made potentially-incriminating
9 statements to authorities in Arizona. Co-defendant Perla Ramirez may testify against him.

10 Moreover, the suggestive nature of Gaytan sitting at the defendants' table during the
11 identification is reduced by the fact that co-defendant Andrade will be seated there as well.
12 Andrade and Gaytan are the same approximate age and look similar enough to present a
13 potentially confusing choice to an identifying witness. Finally, an in-court identification will
14 occur only if the Government first presents a sufficient foundation that the witness can offer a
15 credible identification. *Neil v. Biggers*, 409 U.S. at 199–200; *Lumitap*, 111 F.3d at 85.

16 For the foregoing reasons, Defendant Gaytan's Motion [Dkt. #138] is denied.

17 DATED this 3rd day of September, 2013.

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21 **ANDREW P. GORDON**
22 **UNITED STATES DISTRICT JUDGE**
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